



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Mrs. Smith's Child Care Center

PROPOSED DECISION

ML-09-0375 and ML-10-0010

PRELIMINARY RECITALS

Pursuant to a petition filed on October 22, 2009, under Wis. Admin. Code § DCF 201.01(1)(c) to review a decision by the Department of Children and Families (DCF) to refuse payment of Wisconsin Shares payments to a child care provider, a hearing was held on February 12, 2009 at Milwaukee, Wisconsin.

The issues for determination are 1) whether DCF correctly refused to pay Wisconsin Shares program payments to the provider due to reasonable suspicion of program rule violations and 2) whether DCF correctly determined that the provider was overpaid in the amount of \$5508.24 for the period from August 23, 2009 to September 19, 2009 as the result of inaccurate attendance reporting.

PARTIES IN INTEREST:

Petitioner:

Mrs. Diana Smith
4641 North 39th Street
Milwaukee, Wisconsin 53209

Wisconsin Department of Children and Families
201 East Washington Avenue, Room G200
Madison, WI 53703

By: Attorney Jennifer Wakerhauser

EXAMINER:

Beth A. Whitaker, Administrative Law Judge
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County who operated a family child care center.
2. The center is licensed to provide child care from 6:30 a.m. through 6 p.m. Monday through Friday and was authorized to care for eight children. (Exhibit R-4)
3. The Department targeted petitioner's center because a number of "red flags" were raised in its operation including the amount of authorized child care capacity used and the number of children cared for per slot.
4. On April 15, 2009, DCF licensing specialist Beverly Kunda visited the provider's facility and issued a non-compliance statement and correction plan, advising Smith both not to sign children out until the are gone for the day and not to sign children out when they are still present. (Exhibit R-5)

5. The provider was previously cited for attendance record violations on September 5, 2007 and March 28, 2008.
6. On September 25, 2009, auditor Bob Heitala visited the provider's facility at approximately 2:30 p.m. and after knocking on the door got no response and did not gain entry to the premises. He did not observe children, employees or other signs of child care. The provider was authorized to care for 17 children on that date. (Exhibit 4)
7. On September 29, 2009, Heitala visited the provider's facility again and gained access finding Smith present but seeing no children or employees and no Daily Attendance Reports on site. 5, 2009, the Division notified petitioner that it was suspending all Wisconsin Shares payments to petitioner based upon the reasonable suspicion that she violated program rules. The Division made the suspension permanent.
8. DCF compared Smith's daily attendance record forms (Exhibit R-7) to the hours she submitted for reimbursement on the Child Care Attendance Reports (Exhibit R-7) and determined that the provider was overpaid in the amount of \$5508.24. (Exhibit R-8)

DISCUSSION

Wisconsin Statute § 49.155 provides the legal basis for the Wisconsin Shares program. The program pays state subsidies to child care providers on behalf of low income parents and children. Petitioner operated a child care center in which all children under her care were eligible for and received child care subsidies through the Wisconsin Shares program.

Wisconsin Statute § 49.155(7)(a) provides as follows: "The department or the county department under s. 46.215, 46.22 or 46.23 may refuse to pay a child care provider for child care provided under this section if any of the following applies to the child care provider, employee or person living on the premises where child care is provided: ... 4. The department or county department reasonably suspects that the person has violated any provision under the program under this section or any rule promulgated under this section."

Wis. Admin. Code § DCF 250.04(6)(a) provides that the provider shall maintain a current written record on each child enrolled, and shall make the record available to the licensing representative upon request. § DCF 250.04(6)(b) provides that the licensee "shall maintain a current, accurate written record of the daily attendance on a form prescribed by the department that includes the actual time of arrival and departure for each child for the length of time the child is enrolled in the program."

The department has continually informed providers of the need to keep attendance reports current and accurate. See Exhibit R-9, a series of department "Sharing the News" newsletter sent to Shares program providers. The newsletters reiterated the need to keep accurate, up-to-date attendance records and that the providers were required to make them available to licensing agents upon request.

Smith's testimony that she was confused about reporting requirements and her argument that she had not been trained and therefore made errors was not persuasive and not relevant. Confusion and lack of training do not explain two visits, on September 25, 2009 and September 29, 2009 with no children or employees present. Smith's testimony that she was in route to pick up children from school at 2:30 on September 25, 2009 was not credible. Heitala saw a woman on the front porch who entered the home when he approached and then did not answer the door. Heitala was deliberately denied entry by Smith or someone at her home.

Smith did not deny errors in reporting attendance. She merely pledged to try to improve. The Department did have reasonable suspicion that Smith violated program rules by inaccurately reporting attendance on September 25, 2009 and September 29, 2009 and on other dates. She testified that on at least one occasion

she billed for more children than were present and cited her own possible failure to keep good records as the reason.

Smith's claim in closing argument that Beverly Kunda orally gave her permission to care for children up to three hours after the authorized time was not admissible as it was introduced after the hearing record was closed. Kunda testified at the hearing and was available for cross-examination by Smith. Even if admissible, the claim was not credible.

Smith submitted letters from parents of the children she provides care for (Exhibit P-1), which express support for Smith and praise for her child care practices, but do not address the issue of inaccurate attendance records.

DCF did have reasonable suspicion to refuse to pay Wisconsin Shares payments to the provider effective October 3, 2009.

The statute does not provide guidance regarding the length of suspension. It is not even clear that the Division of Hearings and Appeals has authority to review the issue. It was not raised as an issue in this case and will not be addressed.

Wis. Admin. Code Section DCF 201.04(5)(b) requires a child care administrative agency to take all reasonable steps necessary to recover from a provider any overpayments made for child care services for which the provider is responsible.

Wis. Admin. Code Section DCF 201.04(5)(b) gives DCF authority to take action if it has provided notice to the provider that the provider is in violation of program requirements.

Auditor Sabree testified and documented in Exhibit R-8 that Smith was overpaid \$5508.24 for the period from June 28, 2009 to September 13, 2009 because she billed for hours for which there is no record of children in her care. Smith presented no contrary evidence.

DCF correctly determined the overpayment to this provider in the amount of \$5508.24.

There is no basis for reversing or changing DCF's actions regarding refusal to pay Wisconsin Shares payments based on reasonable suspicion of program rule violations or regarding the overpayment.

CONCLUSIONS OF LAW

1. DCF had a reasonable suspicion that petitioner was violating child care rules and thus correctly suspended Wisconsin Shares payments.
2. DCF correctly determined that the provider was overpaid in the amount of \$5508.24.

NOW, THEREFORE, it is ORDERED

That the petition for review herein be and the same is hereby dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Children and Families for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of
Madison, Wisconsin, this 16th day of
April, 2010.

Beth A. Whitaker, Administrative Law Judge
Division of Hearings and Appeals